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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1014

ROSE K. HARRIS, EUGENE R. SHERRICK, and RENEE BOUCHET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMROW and PHILIP DRIEMAN, as co-partners doing business in the name and style of DAMROW & DRIEMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, & ORS., &c.,

Respondents,

FORDHAM UNIVERSITY, & ORS.,

Intervenors-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION OF LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESPONDENT

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Opinion Below

The opinion of the New York Court of Appeals printed in Appendix "B" to the petition (pp. 35-39) is the unrevised opinion, designated by the Court as "not for publication." The official, revised opinion is printed as Appendix A hereto.

Question Presented

The only federal constitutional question open on this record is a narrow one involving only one aspect of the Lincoln Square Urban Renewal Project, adopted by the City of New York: whether the "establishment of religion" clause of the First Amendment, as read into the Fourteenth, was transgressed by the City's auction sale to Fordham University, a sectarian institution, of a site restricted for educational reuse as part of a larger slum clearance area, for a consideration consisting of

1. a cash payment less than the estimated cost of condemnation but more than the appraised reuse value, and

2. Fordham's obligation to clear and redevelop at its own expense.

On this record, no federal constitutional question is open as to the validity of the condemnation, effected for the public purpose of slum clearance and severable from the particular resale attacked. *A fortiori*, no such question is open as to the validity of resale of other portions of the area to other redevelopers having no religious affiliations, including this respondent, Lincoln Center for the Performing Arts, Inc.

On this record, no question as to the validity of Title I of the Housing Act of 1949 as amended, 63 Stat. 413 *et. seq.*, 68 Stat. 622, 42 U.S.C. §§ 1441, 1450, *et seq.*, can properly come before this Court. *Massachusetts* v. *Mellon*, 262 U. S. 447, 486-9. See below, pp. 11-12.

Statement

The Lincoln Square Urban Renewal Project involves the clearance and redevelopment, for various types of reuse, of thirteen city blocks (Ex. A to Moses Affidavit, not printed, R.* 71). This area was duly found by the City Planning Commission to be a substandard and insanitary area (R. 92): that finding has never been challenged.

In accordance with its established procedure the City, before proceeding with the project, obtained commitments from sponsors to make minimum bids for specified sites within the area and to carry out the public purposes of slum clearance and redevelopment (R. 178, 61-4). The City Board of Estimate, on findings and consent of the City Planning Commission, and its own finding that acquisition was in the interest of the City's health and welfare and effectuation of the statutory purpose of rehabilitation of a substandard area, resolved upon condemnation of a number of separate sites comprising the area (R. 92-99, 78-79). The City then condemned the entire area: the condemnation, except on the basis of one resale, has not been challenged here.

Thereafter, pursuant to separate Resolution of the Board of Estimate (R. 101), separate parcels within the area were offered for sale at public auction. Separate sites, subject to specified reuse restrictions, were sold at public auction to the American Red Cross, Webb & Knapp Lincoln Square Housing Corporation, and this respondent, Lincoln Center for the Performing

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* Record references are to the printed record in the New York Court of Appeals.

Arts, Inc. (herein called "the Center"). No question has been raised as to the eligibility of any of these purchasers. Another and separate site was sold at public auction to Fordham University, a sectarian educational institution, for educational reuse. The entire issue in this case is whether Fordham, because of its sectarian nature, was eligible to purchase the educational site at public auction.

The complaint alleged violations of the Fourteenth Amendment and the State Constitution by acts of the City and its officials (R. 17, 19). It did not allege the unconstitutionality of any statute (see R. 10-22).

The complaint alleged in substance that the City officials, proceeding under § 72-k of the New York General Municipal Law (authorizing condemnation of substandard or slum areas for clearance and rehabilitation), were authorized to apply for feder. aid under Title I of the Federal Housing Act of 1949, as amended, and were processing a plan for redevelopment of the Lincoln Square area; that by a sponsorship contract with the City, Fordham University, a Catholic school, had contracted to bid a minimum price at public auction for the area site restricted to educational purposes; that the City regarded such sponsorship contracts as essential to carrying out such a project; that Fordham was the only possible bidder for the "collegiate" site, which would be acquired by the City at a price substantially greater than Fordham would pay if it acquired the land at its minimum bid; that by virtue of the difference there was a direct subsidy to Fordham, and as a result of the City's exercise of its condemnation power an indirect subsidy to Fordham; and that the alleged acts of the City and its officials and the "condemnation as

approved and authorized by the Board of Estimate as aforesaid" were "illegal, void and a taking of public property for a non-public use in violation of the Fourteenth Amendment,"* and would result in depriving petitioners of their places of residence (R. 10-22). The complaint sought a declaration of invalidity and a broad injunction prohibiting, among other things, condemnation of the whole project area (not merely the collegiate site) and further processing of the City's plans (R. 21-22).

While the complaint referred to Title I of the Housing Act of 1949 [42 U.S.C. § 1450 *et seq.*] as the source of federal financial assistance (R. 11-12, 19), it contained no allegation that the statute was unconstitutional or that the federal officials administering it had performed illegal or unconstitutional acts under it (see R. 10-22). No federal official was made a party.

The complaint did not allege that the collegiate reuse restrictions were adopted for Fordham's benefit; the allegation is that after the Chairman of the City's Committee on Slum Clearance had solicited bids, he "thereafter accepted a sponsorship bid submitted by Fordham University to purchase the collegiate site * * * and restricted said site in the Project plan for redevelopment for educational purposes * * * " (Paragraphs Ninth, Tenth, R. 14, 19).

Although there is a general conclusory allegation that condemnation of the project area will be a taking

* The complaint mentions only the Fourteenth Amendment, but petitioners' arguments have been based on the First Amendment as made applicable to the states by the Fourteenth.

of private property for a non-public purpose, the only supporting facts alleged are those involving Fordham's participation (see R. 10-22). Nor has any other ground of invalidity been urged throughout the proceedings. Petitioners' objections to the project, according to the affidavit in support of their motions, "are solely related to Fordham University's participation as a redeveloper and the corresponding aid and financial subsidy which will be given to a sectarian institution by means of Fordham's participation" (R. 31).

Although the original defendants were only the City and its officials, certain of the proposed redevelopers, including the Center, intervened as defendants (R. 143, 137, 2). The Center is a non-profit organization incorporated for charitable and educational purposes, including promotion of the musical and performing arts. Under its sponsorship contract with the City it was obligated to make a minimum bid at public auction for a site within the Lincoln Square area, and, if the purchaser, to relocate tenants, clear the site, and construct a cultural center, including a new Opera House for the Metropolitan Opera Association and a concert hall for the New York Philharmonic-Symphony Society (R. 143-4).

Petitioners moved for a temporary injunction (R. 23). Defendants, joined by intervenors, moved for summary judgment (R. 121, 135, 144). Petitioners cross-moved for summary judgment (R. 145). Petitioners' motions, including the motion for a temporary injunction, were denied; respondents' motions were granted and the complaint was dismissed (R. 8, 9).

The judgment of dismissal was unanimously affirmed by the Appellate Division (R. 217) and the New

York Court of Appeals (Appendix A hereto, pp. A-1—A-4, *infra*). Prior to the latter affirmance, the City condemned the entire Lincoln Square area and resold portions at public auction. The Center is therefore now the owner of a site within the area which it is obligated to redevelop.

The facts established by Fordham and the City in support of the motion for summary judgment are sufficiently stated in their briefs. They showed, among other things, that the minimum price which Fordham agreed to bid exceeded the value set in any of three separate appraisals of the reuse value of the land, two of which were based on a use (housing) more valuable than the collegiate use (R. 129-131). Both Special Term (R. 202-3), unanimously affirmed without opinion by the Appellate Division (R. 212-4), and the Court of Appeals found that there was no subsidy, gift or grant to Fordham. The Court of Appeals viewed the whole contention of constitutional invalidity as founded on the "assumption, false in fact" that there had been any such subsidy (App. A hereto, pp. A-3—A-4).

The record does not support petitioners' repeated suggestions (see Petition, pp. 3, 6, 19) that the reuse restrictions upon land in the collegiate area were adopted in order to benefit Fordham. While charges to this effect are contained in petitioners' affidavits, they are based only upon inference not justified by the chronology relied on (see R. 149-153, 155-7; cf. P. 127).

Petitioners treat the sale to Fordham as though it were made at a private sale and at a negotiated price. The facts are that (1) the price specified in Fordham's

contract was only a minimum bid, which, however, was in an amount greater than any of three different appraisals (R. 129-31, Ex. B to Moses Affidavit, R. 71—not printed), and that (2) the sale was made at public auction for which bids were solicited and at which non-sectarian educational redevelopers could have bid (R. 62-3, 166-171). Moreover, by the contract Fordham was obligated at its own expense to clear and redevelop the land according to the City's requirements (R. 64).

The Resolution of the City Board of Estimate authorizing the condemnation of the seven separate sites within the Lincoln Square area is included in the Record (R. 92-99). It recites the necessary findings and consents called for by § 72-k of the New York General Municipal Law; it does not mention either "the Plan" or any particular sponsors as potential purchasers (R. 92-99). There is nothing in it to suggest that the condemnation was in any way dependent on any particular sponsors, on resale of any of the sites, or conditioned in any way. The Resolution recites that the Board has found that the acquisition "is in the interest of the City and the health and welfare of its residents and effectuate the purposes of Subdivision 2 of Section 72-k of the General Municipal Law, * * * " (R. 92).

Petitioners' affidavits furnish no basis for their contention that condemnation is inseparable from Fordham's participation (see R. 24-43; 147-165).

ARGUMENT

I

On the Facts There is no Subsidy to Fordham and Therefore no Substantial Federal Constitutional Question

The opinions of the New York Court of Appeals and the New York Supreme Court clearly show the correctness of their conclusions: that on the facts of this case there was no law respecting the establishment of, and no public financial assistance to, religion.

The Court of Appeals pointed out that petitioners' entire argument was based on an "assumption false in fact" (App. A hereto, p. A-3). From the undisputed evidentiary facts (both sides having moved for summary judgment), the Court found the ultimate fact that there was no gift, grant or subsidy of public funds to Fordham,* but an exchange of considerations pursuant to sale after an auction open to any other bidders able to meet the upset price established by appraisal, and able to clear and redevelop in accordance with the collegiate reuse restrictions. That decision, based on the particular fact situation involved, was clearly correct, is not in conflict with decisions of this Court, and does not merit review by this Court. There is thus no substantial federal constitutional question.

There is in this case no element of coerced education in religious faith, no alleged loss of the personal right

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* Other state courts have reached similar conclusions on similar facts. See *Vedishka* v. *City of Nashua*, 99 N.H. 161, 168, 106 A. 2d 571, 575-6; *People* v. *City of Chicago*, 414 Ill. 600, 617-8, 111 N.E. 2d 626, 636-7; cf. *Redevelopment Agency of San Francisco* v. *Hayes*, 122 Cal. App. 2d 777, 807-8, 266 P. 2d 105, 125, cert. den. 348 U. S. 897.

to freedom of conscience. The religious question was interjected solely by reason of Fordham's purchase at public auction of land condemned by the City, subject to use restrictions adopted as part of the City's slum clearance program, and at a price greater than the appraised value of the land as restricted. It is therefore irrelevant that the City's estimated cost for the land was greater than the price paid by Fordham; the City's cost was for the land and buildings without the restrictions placed thereon for the public purpose of slum clearance, and without the obligation to clear and rebuild.

The difference between the value of the blighted land as condemned, and the reuse value, is not a subsidy to any purchaser at the auction. It is simply the cost of removing slums in the public interest. On the admitted facts, the finding of absence of gift, grant or subsidy is plainly justified.

The reuse restrictions requiring use of the land for educational purposes were clearly proper. Cf. *Berman* v. *Parker*, 348 U. S. 26. Nor is there any basis for suggesting that such restrictions limited use to religious educational institutions; there were no such restrictions as to foreclose availability to a non-sectarian institution (R. 63-64, 68, 127).

Petitioners also seek to spell out a subsidy to Fordham, despite the facts of the case, by inference from what they erroneously regard as the Congressional purpose in enacting Title I of the federal Housing Act. They argue (see Petition, p. 13) from the preamble and legislative history that the Congressional purpose was "subsidizing" private redevelopers, rather than assist-

ing municipalities to attain slum clearance and housing objectives. In this they wholly misread the Act. The federal funds go solely to the "local public agencies". 68 Stat. 622, 42 U.S.C. § 1450. It is unambiguously clear from the statute itself that the Congressional purpose was to further housing and slum clearance; that the recipients of any "subsidies" were the municipalities, not the private redevelopers; and that private enterprise was utilized merely as a means of effectuating the Congressional and municipal purposes.

On the facts, the situation falls within that well-established area of the law: that in municipal slum clearance and redevelopment programs, any merely incidental private benefit is immaterial where the public purpose of slum clearance is served. *Burt* v. *Pittsburgh*, 340 U. S. 802; *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 659, *cert. den.* 347 U. S. 934; *Matter of Murray* v. *LaGuardia*, 291 N. Y. 320, 52 N. E. 2d 884, *cert. den.* 321 U. S. 771; *Berman* v. *Parker*, 348 U. S. 26. Nor is it objectionable if the indirect recipient of an incidental benefit is religious in character. Cf. *Everson* v. *Board of Education*, 330 U. S. 1, 7.

The petition (pp. 13-14, 16), arguing the existence of a novel question, purportedly questions the constitutionality of Title I of the federal Housing Act of 1949, 63 Stat. 413, *et seq.*, as amended 68 Stat. 622, 42 U.S.C. §§ 1441, 1450 *et seq.* No question as to that statute is here open, for two reasons:

1. The federal statute, if involved in this case at all, involves only the expenditure of federal funds. But no individual, even assuming him to be a federal taxpayer, has standing to raise the question of constitu-

tionality of such expenditures. *Massachusetts* v. *Mellon, Frothingham* v. *Mellon,* 262 U. S. 447, 486-9.

2. In any event, as set forth above, no question as to the federal statute was properly raised below. No constitutional invalidity of the statute was alleged in the complaint or in petitioners' motion papers; no federal officials were made parties to the action; and no invalidity of the acts of such officials was urged. The opinions below (R. 200-207; App. A hereto, pp. A-1—A-4) do not establish that the New York courts were passing upon the constitutional validity of the federal statute. This Court lacks jurisdiction of a constitutional question not presented in the record and not necessarily passed on by the State court. See *Lynch* v. *New York,* 293 U. S. 52, 54; *Weber* v. *Opera on Tour,* 314 U. S. 615; cf. *Ellis* v. *Dixon,* 349 U. S. 458; *Rector, etc.* v. *Melish,* 301 N. Y. 679, 95 N. E. 2d 43, *cert. den.* 340 U. S. 936.

II

Since There is no Constitutional Question as to Condemnation of the Area, or as to Resale of a Portion to the Center, There is no Basis for Review of Either of These Severable Matters

Petitioners attempt to enmesh condemnation of the substandard area with subsequent resale of a part of it to Fordham. On the facts and under applicable state law, condemnation and resale are separate and distinct. Petitioners advance no other ground for

attack on the condemnation. (While petitioners assert that the condemnation was not for a public use, the only basis for that assertion is conceded to be Fordham's participation (R. 31)). Since even an invalid resale would not suffice to invalidate the prior condemnation, there is no federal constitutional question as to condemnation. *A fortiori,* there is no constitutional question as to resale, after condemnation, to organizations such as the Center which have no religious character.

It is well settled that slum clearance is a valid public purpose justifying condemnation. *Burt* v. *Pittsburgh,* 340 U. S. 802; *Berman* v. *Parker,* 348 U. S. 26. The constitutionality of § 72-k of the New York General Municipal Law, under which the condemnation here took place, is also settled. *Kaskel* v. *Impellitteri,* 306 N. Y. 73, *cert. den.* 347 U. S. 934. Explicit in the decision of the Court of Appeals below is the view that the City's purpose in this case was "its valid municipal purpose of eliminating a slum" (p. A-4, *infra*). The recitals in the Resolution of the Board of Estimate authorizing condemnation, as well as the New York statute, set forth this public purpose (R. 92; see Appendix to Petition, pp. 33-4).

Petitioners imply that condemnation was for the purpose of resale to Fordham. The record repels any such interpretation. This is merely a variation of the familiar argument, repeatedly demolished in the slum clearance cases,* that because there is a resale to pri-

* See, e.g. *Matter of Murray* v. *La Guardia,* 291 N. Y. 320, 329-330, 52 N. E. 2d 884, 888, *cert. den.* 321 U. S. 771; *Redevelopment Agency of San Francisco* v. *Hayes,* 122 Cal. App. 2d 777, 801, 266 P 2d 105, 120-1, *cert. den.* 348 U. S. 897; *People* v. *City of Chicago,* 414 Ill. 600, 611, 111 N. E. 2d 626, 633; *Velishka* v. *City of Nashua,* 99 N. H. 161, 166, 106 A 2d 571, 574.

vate parties the *purpose* is a private purpose, or one to benefit the private purchasers. This argument was decisively laid to rest by this Court in *Berman* v. *Parker, supra*:

> "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established * * *" (p. 33).

Resale to private parties does not make the use or purpose private; no more does resale of a part of the Lincoln Square area to Fordham affect the public purpose of this condemnation. On the record there is no basis whatsoever for saying that the purpose of the Board of Estimate in condemning the Lincoln Square area was anything other than that declared: clearance and redevelopment of a substandard area.

And as this Court pointed out in *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, 607, and quoted in *U. S. ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 552: "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws." See also the opinion of the District Court in *Burt* v. *Pittsburgh* (unreported but included in the Supreme Court record in that case, p. 27, 340 U. S. 802).

The New York statute (compliance with which is recognized by the decision below) makes plain the independence of condemnation and resale.

Section 72-k of the New York General Municipal Law authorizes condemnation for the statutory purpose of clearance and redevelopment of substandard areas whether or not resale is contemplated. Subdivision 1 authorizes condemnation for the statutory purpose without any mention of resale. Subdivision 2 provides that in addition to other methods of disposition, the governing body "may" resell (see Appendix to Petition, pp. 33-4). Moreover, where resale is contemplated, the only requirement is that the City act on certain findings and consents, and insert provisions in the deeds insuring fulfillment of the slum clearance objectives; there is no requirement of any complete "plan" for the whole area, so that if one resale is invalid all resales must fall.

Condemnation and resale were here likewise separately dealt with in the resolutions of the Board of Estimate. The Resolution authorizing condemnation deals with several distinct parcels, and is itself separate from the Resolution authorizing resale. Both those Resolutions are also separate from the several Resolutions authorizing the sponsorship contracts (R. 39-41, 92-99, 101, 78-79).

In attempting to argue that the resale to Fordham was an inseparable element of the condemnation, petitioners lean heavily on Fordham's position in the Urban Renewal Plan (see e.g. R. 12-13, 16-17, 31-2; Petition, pp. 3-9). But the existence of an approved plan was not a prerequisite to condemnation. The only requirement of a "plan" is contained in Title I of the federal Housing Act of 1949, as a condition to federal financial assistance to the municipality. But § 72-k of the New York General Municipal Law does not make federal assistance a condition precedent or subsequent to condemnation; it merely provides that the

Board of Estimate "may" seek federal assistance. Condemnation is valid in the absence of any Urban Renewal Plan.

In insisting that the whole project must fall if the resale to Fordham was invalid, petitioners are asking this Court to substitute its judgment for that of the body to which the New York legislature entrusted the task. The Board of Estimate found condemnation of the Lincoln Square area to be in the interest of the City and its health and welfare (R. 92). And this Court has determined that:

> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman* v. *Parker*, 348 U. S. at 35-6.

See also *Starr, et al.* v. *Nashville Housing Authority*, 145 F. Supp. 498, aff'd 354 U. S. 916.

Petitioners' attack on the City's contract with Fordham and on the validity of the resale to Fordham afford no basis for constitutional attack on the condemnation. No other basis exists in the record.

Since validity of the condemnation cannot be questioned, and since there is no question as to the eligibility of the Center as a purchaser at resale by public auction, there is no ground for interference with the Center's utilization of its land or its redevelopment thereof in accordance with its contract with the City and the restrictions in its deed. Even if the resale to Fordham were to be regarded by this Court as ques-

tionable, petitioners' sole grievance would justify review of no more than that particular resale.

Moreover, since petitioners are not within the Center's area (see Petition p. 5, footnote), they are not affected by the Center's ownership and lack standing to raise questions as to its purchase.

Accordingly, the record does not justify review of the condemnation or of the resale to the Center, both of which matters are severable from the resale to Fordham.

CONCLUSION

The questions raised by the petition are without merit. The petition lacks substantial grounds and should be denied. In any event, there is no basis for review either of the condemnation or of the resale to this respondent.

Respectfully submitted,

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May 28, 1958

APPENDIX A

(Opinion of Court of Appeals, State of New York)

64th St. Residences, Inc., et al., Appellants, *v.* City of New York et al., Respondents, and Fordham University et al., Intervenors-Respondents.

Decided May 1, 1958.

Appeal, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 20, 1958, which unanimously affirmed a judgment of the Supreme Court, entered in New York County upon an order of the court at Special Term (Owen McGivern, J), (1) granting motions for summary judgment dismissing the complaint, and (2) denying a motion by plaintiffs for summary judgment.

[Appearances]

Desmond, J. Plaintiffs are owners and tenants of real property in the so-called "Lincoln Square Project" area on the west side of Manhattan running from 60th Street to 70th Street, bounded on the east and west by various streets and consisting altogether of 13 city blocks. Beginning in 1954, by appropriate actions of various of its public officers and bodies, the city, as authorized by section 1 of Article XVIII of the State Constitution and section 72-k of the General Municipal Law (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. denied 347 U. S. 934), found the Lincoln Square area to be "substandard and insanitary", approved a plan for renewal thereof and ordered its acquisition by the city through condemnation. To secure a grant of Federal moneys pursuant to the National Housing Act (U. S. Code, tit. 12, § 1701 *et seq.*), the city's Board of Estimate presented to the Federal Urban Renewal Administration the city's proposal for the "Lincoln Square Urban Renewal Project". Before such presentation the city had obtained and had included in the plan agreements by various "sponsors". Among those sponsors are intervenors Fordham University and Lincoln Center for the Performing Arts,

Inc., a newly formed membership corporation with the principal function of promoting the musical and dramatic arts.

Each such sponsor agreed, as part of the Urban Renewal Plan, to bid, at the auction provided for by section 72-k of the General Municipal Law, a stated minimum price and, if it should be the successful bidder, to relocate the prior occupants, clear its part of the site and redevelop that part as required by the plan, with buildings to be approved by the city. Fordham University agreed as such sponsor to bid, for the two-block part set aside for "educational purposes", at least $2,241,610, or $7 per square foot, which was higher than the "re-use value" fixed by any of several appraisals. The city on its part agreed to acquire that allotted part (as well as the rest of the area) by condemnation, and, if Fordham University should be successful at the auction, to convey that part to the university at the auction price. Other sponsors made separate agreements which need not be described in detail. The Federal Housing and Home Finance Agency then approved the whole project and plan. The consequence of such approval is, under the Federal statutes (U. S. Code, tit. 42, § 1450 *et seq.*), that the Federal Government will pay two thirds of the difference between what the city pays for this land and the amount realized at the auction. The city itself must stand the other third.

After the plan had been approved, as above described, plaintiffs brought this present suit to invalidate the plan and to enjoin the city from carrying it out. The theory of the complaint is that the resale of part of this area to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of $3,500,000 in violation of section 7 of article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions. After the institution of this suit the city, on February 28, 1958, took title to the project area by condemnation and conducted the auction at

which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action, at least as praying for a declaratory judgment.

Special Term denied the motion of plaintiffs for a temporary injunction and for summary judgment and granted the motion of the defendants and intervenors under rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint on the ground that it does not state a cause of action. Appellate Division, First Department, unanimously affirmed without opinion, judgment of dismissal was entered thereon, and plaintiffs appeal to this court as of right, presumably on constitutional grounds (Civ. Prac. Act, § 588, subd. 1, par. [a]).

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the

assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.

At some points in their argument plaintiffs seem to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 95, *supra*—dissenting opinion but representing the whole court's views on that question; and see *Bleecker Luncheonette* v. *Wagner*, 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029).

The judgment should be affirmed, with costs.

Chief Judge Conway and Judges Dye, Fuld, Froessel, Van Voorhis and Burke concur.

Judgment affirmed.